Centex Independent Electrical Contractors Association, Inc. and Mills Electric, Inc. *and* International Brotherhood of Electrical Workers Local Union No. 520 a/w International Brotherhood of Electrical Workers, AFL–CIO. Case 16–CA–19900

August 15, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 19, 2001, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. Respondents filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the administrative law judge's rulings, findings,[1] and recommendations only to the extent consistent with this Decision and to adopt the judge's recommended Order.

As a threshold matter, the judge found that the General Counsel failed to meet his burden of proving that Respondent Centex satisfied the Board's discretionary standards for exercise of jurisdiction as alleged in the complaint. On this basis, the judge dismissed all allegations in the complaint against Respondent Centex. In addition, the judge made alternative findings as to the remaining allegations against Centex and determined that they were without merit.

The judge correctly noted that in its answer to the complaint, Centex denied General Counsel's allegation that it met the Board's jurisdictional standards. On the first day of the hearing, however, Centex amended its answer and stipulated that Centex met the jurisdictional standards as alleged in the complaint. The judge inadvertently overlooked this stipulation in his decision. We therefore find that the Board has jurisdiction over Respondent Centex, and reverse the administrative law judge's finding to the contrary.[2]

We affirm the judge's remaining rulings, findings, and recommendations.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint.

Dated, Washington, D.C. August 15, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Tamara J. Gant, Esq., for the General Counsel.
Frank Carrabba, Esq. and *Jennifer Cooper, Esq.*, of Houston, Texas, for the Respondent CenTex Independent Electrical Contractors Association, Inc.
Robert D. Kilgore, Esq. and *Denise Rios, Esq. (Cox & Smith),* of San Antonio, Texas, for Respondent Mills Electric, Inc.
David Van Os, Esq., for the Charging Party.

DECISION

KELTNER W. LOCKE, Administrative Law Judge. The General Counsel of the National Labor Relations Board (the Board) has alleged that an association of electrical contractors and an electrical contractor violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). I find that the General Counsel has failed to establish that the association meets the Board's standards for assertion of jurisdiction. Further, I find that the electrical contractor did not violate the Act as alleged. Therefore, I recommend that the Board dismiss the complaint in its entirety.

I. PROCEDURAL HISTORY

This case began on May 27, 1999, when International Brotherhood of Electrical Workers Local Union No. 520, affiliated with International Brotherhood of Electrical Workers, AFL–

[1] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In doing so, Chairman Battista and Member Liebman do not rely on all of the judge's nondemeanor based credibility findings.

[2] Member Schaumber notes that neither the General Counsel nor the Charging Party raised the jurisdictional issue or Centex's stipulation regarding jurisdiction during closing arguments.

[3] In adopting the judge's dismissal of allegations that Respondent Mills' hiring policies violated Sec. 8(a)(3) and (1) of the Act, we note that, in the absence of exceptions to the judge's recommendation, we do not pass on the judge's discussion of "inherently destructive" and "disparate impact" theories.

CIO (the Charging Party or the Union) filed the initial charge in Case 16–CA–19990. The Union amended this charge on October 20, 1999.

After an investigation, the Regional Director for Region 16 of the Board issued a complaint and notice of hearing on November 30, 1999. The Regional Director thereafter amended the complaint. In taking these actions, the Regional Director acted on behalf of the General Counsel of the National Labor Relations Board (the General Counsel or the Government).

The Respondents, CenTex Independent Electrical Contractors Association, Inc. (IEC or CenTex) and Mills Electric, Inc. (Mills) filed timely answers to the complaint.

On November 13, 2001, a hearing opened before me in Austin, Texas. The parties presented evidence on November 13, 14, 15, and 16, 2001. On November 20, 2001, counsel for all parties presented oral argument.

II. CREDIBILITY OF THE WITNESSES

This decision will address the allegations against CenTex and then will consider the allegations against Mills. Issues concerning which testimony should be credited are relevant to both Respondents. Therefore, the credibility of the witnesses will be discussed first.

Based on my observations of the witnesses, I conclude that Charles (Randy) Jennings, the executive director of CenTex, consistently gave reliable testimony. Where it conflicts with that of other witnesses, I credit Jennings.

Also based on my observations of the witnesses, I conclude that Jerry Roudebush, the vice president of Mills, testified truthfully and reliably. I credit his testimony.

I have less confidence in the testimony of other witnesses and do not credit such testimony to the extent it conflicts with that given by Jennings and Roudebush. Although I base these credibility determinations largely on the demeanor of the witnesses, there are additional reasons to doubt the testimony offered by certain of these witnesses.

Witness Charles Jewell testified that in September 1998 he went to the CenTex office and spoke with Jennings about the possibility of employment. Jennings asked Jewell for references. Jewell told Jennings that he had worked for a contractor known as Burger Electric, but that statement was a lie. Jewell further misled Jennings by providing the name of a man who supposedly could attest to Jewell's work at Burger Electric. In truth, this man could not vouch for Jewell's work at Burger Electric because Jewell had never worked there.

In addition to this admitted untruthfulness, there are other reasons to doubt Jewell's testimony. On cross-examination, Jewell admitted that he took a tape recorder with him to the IEC offices. He had failed to mention this fact on direct examination.

Also on cross-examination, Jewell at first denied that he had any reason to go to the IEC office except to get work. Later, he admitted that he had gone there for another reason, to see how the IEC might react to a job applicant with union ties.

Considering all these factors, in addition to my observations of the witnesses, I conclude that Jewell's testimony is not reliable, and I do not credit it.

For several reasons, I do not credit the testimony of Richard Zerr. The job application he completed at the IEC offices asked him to list the names of past employers. Zerr admitted that he left out the names of certain contractors for whom he had worked. Although this act of omission may not call into question Zerr's truthfulness in the same way as an outright lie, it does raise the possibility that Zerr lacked candor by omitting facts from his testimony.

On direct examination, Zerr said that he had asked Jennings about a sign which announced that the IEC was only accepting applications from apprentices, and that in response to Zerr's question, Jennings said, "[D]on't worry about it." On cross-examination, however, Zerr admitted that the affidavit he gave during the investigation did not quote Jennings as making this statement.

Zerr did the most damage to his credibility when asked to explain his decision to go to the IEC to apply for work. Zerr initially said that he had gone there to "test a hypothesis" but then gave a confusing explanation when asked to describe the hypothesis. His shifting explanation concerning the supposed hypothesis raises doubts about the fidelity of his testimony to the facts.

For all these reasons, I conclude that Zerr's testimony was not reliable. I do not credit it.

In addition to my observations of the witnesses, there were additional reasons to doubt the testimony given by Ralph Merriweather, who had made a visit to the IEC offices. When asked on cross-examination why he did not return to the IEC offices later, Merriweather made a reference to someone "kicking his butt," suggesting that his first visit to the IEC offices had been unpleasant. However, earlier in his testimony, Merriweather had described how cordial Jennings had been to him during the first visit.

At one point in his testimony, concerning the presence of another person when Merriweather visited the IEC offices, Merriweather appeared to be evasive. I do not have confidence in Merriweather's testimony, and do not credit it.

Michael Murphy, an organizer on the Union's staff, testified on behalf of the General Counsel. On direct examination, Murphy described a conversation he and two other union representatives had with the IEC's executive director, Randy Jennings, on February 9, 1999. Murphy testified that one of the union representatives, Ralph Merriweather, told Jennings that he would like to offer the IEC the 200 people on the Union's out-of-work list. Murphy testified that Jennings replied that "he was more interested in those 200 electricians than he was interested in hiring Ralph and I, *as we were staff organizers*." (Emphasis added.)

On cross-examination, Murphy admitted that when he described this conversation in his pretrial affidavit, he did not attribute to Jennings the words "as we were staff organizers." Instead, his pretrial affidavit quoted Jennings as saying "that he was more interested in those 200 electricians than in Ralph or me, *and that there was plenty of work available*." (Emphasis added.)

Clearly, some differences between a witness's pretrial affidavit and his testimony at hearing are to be expected. Witnesses often do not recall exact words, and some paraphrasing is fully

consistent with credible testimony. However, Murphy did not merely paraphrase what Jennings said, as reported in the pretrial affidavit, but instead added language which constituted evidence of unlawful motivation.

If Jennings really had made a statement which indicated unlawful motivation, it is highly likely that Murphy would have reported it in his pretrial affidavit. Murphy works for the Charging Party and gave the affidavit during the investigation of the charge. He would not have left out of the affidavit words which established animus if Jennings really had said those words.

The disparity between Murphy's pretrial affidavit and his testimony causes me to doubt his testimony. To the extent it conflicts with that of Jennings, I do not credit it.

The Charging Party asserts that some of the witnesses made tape recordings of their conversations with Jennings, and that these tape recordings support the testimony of these witnesses. However, the Charging Party only sought to introduce one such tape recording during the hearing, and this tape was of such poor quality that I found it had no probative value.

Although tape recordings are admissible, notwithstanding that one party to the conversation was unaware of the taping, the recording still must be sufficiently clear that voices on the tape may be identified unequivocally. Additionally, a tape recording must be intelligible enough to give some assurance that there are no gaps which would suggest incompleteness or later alternation.

The tape recording offered as an exhibit did not satisfy these standards and was not admitted into evidence. There is no tape recording in the record and therefore the Charging Party's argument - that tape recordings corroborate the testimony of certain witnesses - must be rejected.

III. ALLEGATIONS PERTAINING TO RESPONDENT IEC

A. Summary of Disputed Allegations

Portions of complaint paragraphs 2, 3, and 4 plead facts to support the conclusion alleged in complaint paragraph 5(a), that at all material times the IEC has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent's answer denies many of these allegations and also denies the legal conclusion.

Complaint paragraph 8 alleges that at all material times the IEC has been an agent of Mills "for the purpose of acceptance and referral of employment applications to Respondent Mills." Both the IEC and Mills deny this allegation.

Complaint paragraph 9 alleges that since about April 21, 1999, Respondent IEC has maintained a discriminatory referral system. Respondent denies this allegation.

Complaint paragraph 14 alleges that three individuals named earlier in the complaint, Michael Murphy, Gordon Byram, and Ralph Merriweather, appeared at the IEC office about April 21, 1999, and asked to complete employment applications to replace their recent-expired applications. Complaint paragraph 15 alleges that on about April 21, 1999, the IEC refused to allow these individuals to complete new applications. Complaint paragraph 16 alleges that the IEC engaged in this conduct to discourage employees from forming, joining or assisting the Union and engaging in concerted activities. Respondent IEC denies these allegations.

Respondent also denies that it had violated the Act in the manner alleged in the complaint. The General Counsel bears the burden of proving these allegations.

B. The Board's Jurisdiction

Section 102.15 of the Board's Rules requires that a complaint contain "a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated." In accordance with this requirement, the complaint includes the following allegations pertaining to the assertion of jurisdiction over the IEC.

Complaint paragraph 2(a) alleges that at all material times, "Respondent I.E.C., a Texas corporation with an office and place of business located at Houston, Texas, has been engaged in business as a trade association and has provided services to local electrical contractors, including its member Respondent Mills, which services include referral of job applicants, apprenticeship training program and continuing education courses." In its answer, the IEC admits it was a trade association but denies the remaining allegations in this complaint paragraph.

Complaint paragraph 3(a) alleges that "[d]uring the past twelve months Respondent I.E.C., in conducting its business operations described above in paragraph 2, subparagraph (a), has derived gross revenues in excess of $150,000." The IEC denies this allegation.

Complaint paragraph 4 alleges that "[d]uring the period January 1, 1999, to December 31, 1999, Respondent I.E.C. is projected to earn gross revenues in excess of $200,000." The IEC denies this allegation.

Complaint paragraph 5 alleges that the IEC had been, at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The IEC denies this allegation.

The denials in Respondent's answer place in controversy the issue of whether it meets the Board's standards for the assertion of jurisdiction over it. The General Counsel bears the burden of proving the facts alleged to support the conclusion that the Board should assert jurisdiction.

The amended complaint pleads that the assertion of jurisdiction is predicated on two alleged facts: First, that during the 12-month period preceding the amended complaint, which is dated April 26, 2000, the I.E.C. derived from its business operations gross revenues exceeding $150,000; and second, that during the period January 1 to December 31, 1999, the IEC "is projected to earn gross revenues in excess of $200,000." The record does not contain evidence sufficient to establish either of these allegations, and I find that for these allegations, the General Counsel has not met the government's burden of proof.

In oral argument, the General Counsel did not contend that evidence established that the IEC had derived gross revenues of $150,000 during the 12 months preceding the complaint or that the IEC had derived gross revenues exceeding $200,000 during the period January 1 to December 31, 1999. Instead, the General Counsel argued that the Board could assert jurisdiction over the IEC on a basis not appearing in the complaint. The General Counsel stated:

> Section 2(2) of the Act provides that "the term employer includes any person acting as an agent of an employer, directly or indirectly."
>
> Since CenTex IEC is an agent of its contractor members, it follows from the statutory language that CenTex IEC is an employer within the meaning of the Act. Also the Board has asserted jurisdiction over a trade association, as an employer, where its employer members met the appropriate jurisdictional standards. *AGC of California*, 242 NLRB 891 (1979) case.
>
> Since it is admitted that Respondent Mills herein meets the Board's jurisdictional standards, the Board may appropriately assert jurisdiction over CenTex IEC.

The General Counsel's argument that jurisdiction may be asserted over the IEC because the IEC "is an agent of its contractor members" rests on incorrect factual and legal propositions. At the outset, it may be noted that the complaint did not allege that the IEC was "an agent of its contractor members." Rather, complaint paragraph 2(a) only alleged that the IEC "has provided services to local electrical contractors, including its member Respondent Mills, which services include referral of job applicants, apprenticeship training program and continuing education courses."

There is a significant difference between alleging that a person provided services to someone else and alleging that the person is an agent of someone else. In most instances, the person providing services is not an agent of the person receiving services and the receiver of such services cannot be held liable for the acts of the provider. Complaint language alleging a provider-receiver relationship is not sufficient to allege a principal-agent relationship.

The complaint does allege that the IEC is an agent of one particular contractor, Mills. Specifically, complaint paragraph 8 alleges that at all material times, the IEC was "an agent of Respondent Mills for the purpose of acceptance and referral of employment applications to Respondent Mills." Both IEC and Mills have denied this allegation.

At best, the language of complaint paragraph 8 alleges a limited and circumscribed agency relationship, one limited to "the purpose of acceptance and referral of employment applications." Arguably, such an allegation might describe a special agent, rather than a general agent. It does not, I conclude, allege an agency relationship sufficient to assert jurisdiction over the IEC solely because Mills falls within the Board's jurisdiction.

More fundamentally, for reasons to be discussed later in this decision, I conclude that the credited evidence fails to prove any kind of agency relationship between Mills and the IEC. Therefore, the General Counsel may not establish jurisdiction on the basis that the IEC was acting as an agent of an employer which met the Board's jurisdictional standards.

Additionally, the General Counsel argues that "the Board has asserted jurisdiction over a trade association, as an employer, where its employer members met the appropriate jurisdictional standards." It is true that the Board asserts jurisdiction over an association, based upon the commerce conducted by one or more of its members, when those members have delegated to the association authority to represent them in multiemployer collective bargaining with a union. A publication prepared by the Office of the General Counsel describes these circumstances:

> All members of a multiemployer group who participate in, or are bound by, multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes. *Insulation Contractors of Southern California*, 110 NLRB 638 (1955). Jurisdiction is asserted if the standards are satisfied by any member of the association (*Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543 (1959)), or on proof of a qualifying total of business of association members collectively without regard to that of the individual member (*Federal Stores*, 91 NLRB 647 (1950); *Checker Cab Co.*, 141 NLRB 583 (1963); *Transportation Promotions*, 173 NLRB 828 (1969)).

An Outline of Law and Procedure in Representation Cases, Section 1-208. The case cited by General Counsel in oral argument, *AGC of California*, 242 NLRB 891 (1979), is consistent with this principle. The respondent in that case was a contractor association which served as the collective-bargaining representative for certain of its members.

That case is distinguishable from the present one because the IEC is not Mills' collective-bargaining representative. In fact, the record does not establish that the IEC is the collective-bargaining representative of any of its members.

Even if a particular employer meets the Board's jurisdictional standards, if it has not assigned its bargaining rights to a multiemployer association, its status as an employer engaged in commerce cannot provide the basis for assertion of jurisdiction over another employer in the association. See *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1497 at fn. 32 (2000). By the same logic, an employer which itself meets the Board's jurisdiction standards cannot provide a basis for assertion of jurisdiction over an association to which it belongs unless the employer has assigned its bargaining rights to the association.

The present record does not establish that Mills assigned its bargaining rights to the IEC. Mills is a nonunionized employer and does not bargain with a labor organization. Therefore, the fact that Mills meets the Board's jurisdictional standards does not provide a basis for assertion of jurisdiction over the IEC.

Issues concerning Board jurisdiction can be divided into two categories. The first pertains to whether or not the statute has conferred jurisdiction on the Board. The definition of "employer" in Section 2(2) of the Act excludes certain entities, including, among others, Federal Reserve banks, states, political subdivisions of States, and persons subject to the Railway Labor Act. If a respondent asserts that it is a political subdivision of a State, for example, the respondent has raised a question concerning the Board's statutory jurisdiction.

The second category pertains to issues regarding the Board's "discretionary" jurisdiction. To use its resources most effectively, the Board has chosen to promulgate standards relating to an employer's participation in or effects on interstate commerce. The Board declines to assert jurisdiction over employers which do not meet its applicable standard.

The distinction between statutory and discretionary jurisdiction may affect a respondent's duty to raise the jurisdictional issue early in the proceeding. If the Board lacks statutory jurisdiction over a particular respondent, the respondent's failure to raise the issue does not waive it. A respondent is not Congress, and a respondent's waiver cannot confer on the Board jurisdiction which Congress has never given to it.

On the other hand, an employer within the Board's statutory jurisdiction needs to let the Board know if it falls outside the discretionary standards. In the present case, I find that the IEC has raised the issue of discretionary jurisdiction in a timely fashion by denying, in its answer to the complaint, both the alleged facts on which jurisdiction was predicated and the legal conclusion to be drawn from those facts. Additionally, the IEC raised the jurisdiction issue again in oral argument. Clearly, the jurisdiction issue has not been waived.

Finally, it may be noted that the evidence indicates that the IEC would, in fact, meet the definition of "employer" in Section 2(2) of the Act and therefore would come within the Board's statutory jurisdiction. For example, it operates an apprenticeship program approved by the United States Department of Labor.

Additionally, Section 2(2) defines "employer" to include any person acting as an agent for an employer either directly or indirectly. Even though the credited evidence does not establish that the IEC hired employees for its members or even recommended candidates to its members, an agent of an employer does not have to possess labor relations authority to meet the statutory definition in Section 2(2). See, e.g., *Associated Builders & Contractor, Inc.*, 331 NLRB 132 (2000). I conclude that the IEC meets the 2(2) definition and therefore falls within the Board's statutory jurisdiction, but that conclusion does not alter my separate conclusion that the evidence does not establish that the IEC satisfies the Board's discretionary jurisdiction standards.

Because the Government has failed to meet its burden of proving that the IEC satisfies the Board's discretionary standards for exercise of jurisdiction, I recommend that all complaint allegations against the IEC be dismissed.

Moreover, because the General Counsel has not proven that the IEC falls within the Board's discretionary standards for exercise of its jurisdiction, it is not necessary to address the other complaint allegations against this respondent. However, I will summarize briefly the findings I would have made had the evidence established jurisdiction.

C. Complaint Paragraph 9

Complaint paragraph 9 alleged that Respondent had maintained a discriminatory referral system. The credited evidence does not prove this allegation.

The record establishes that the IEC maintained a referral system only to the extent that it provided application forms to electricians requesting them, accepted applications completed by job seekers, kept them on file, and provided them to its members on request. Specifically, when a member notified the IEC that it wanted to hire someone, it would inform the IEC of what type of employee, e.g., journeyman or apprentice, it wished to hire, and the IEC would send the member applications submitted by job seekers matching the desired qualifications.

The credited evidence establishes that neither the IEC nor its executive director screened the applications in any way except to make sure that the applicant's qualifications were consistent with those described by its member. The record does not establish that either the IEC or its executive director made recommendations to members regarding which applicants should be hired or rejected. The record also fails to establish that either the IEC or its executive director ever took a substantive role in any member's process of considering a job applicant, or ever communicated with an applicant, on behalf of a member, to offer that applicant employment.

Further, based on the credited evidence, I find that neither the IEC nor its executive director made statements that job seekers should not apply directly to the IEC's member contractors. Likewise, I find that neither the IEC nor its executive director made statements that if a job seeker applied directly to an IEC member, the member would tell the applicant to file an application instead with the IEC.

The credible evidence establishes only that the IEC performed the ministerial act of accepting applications from job seekers and forwarding them to its members on request. The evidence fails to establish that the IEC or its executive director exercised any discretion in evaluating the qualifications of any candidate. Therefore, I do not conclude that Mills or any other member of the association made the IEC its agent for the purpose of hiring applicants or screening them and recommending them for hire.

The General Counsel further contends that even if the evidence does not establish an actual agency relation, it demonstrates that the IEC had apparent authority to act as an agent for its members. The General Counsel's arguments about agency status will be discussed further in the section of this decision dealing with the allegations against Mills. At this point, it suffices to note that the General Counsel's arguments are unpersuasive.

The credited evidence also establishes convincingly that the IEC never served as an exclusive referral source for its members and that the IEC never held itself out to be an exclusive referral source. The Union's own records establish the contrary. These records include a number of newspaper help-wanted advertisements showing that various IEC member-contractors announced directly to the public that the advertising contractor was seeking job applicants. In each of these advertisements, the contractor did not instruct the applicant to go to the IEC but instead listed the contractor's own telephone number.

Additionally, I find that no credible evidence establishes that the IEC or its executive director either harbored or acted on antiunion animus when operating the IEC's referral service. Moreover, the record contains no credible evidence that either the IEC or its executive director ever sought, in any way, to dissuade a member from hiring an applicant. Therefore, were I to reach the merits of these allegations, I would conclude that the government has failed to prove the violation alleged in complaint paragraph 9.

D. Complaint Paragraphs 15 and 16

Complaint paragraph 15 alleges that about April 21, 1999, the IEC refused to allow three named individuals to complete new employment applications. Complaint paragraph 16 alleges that the IEC took this action to discourage employees from forming, joining or assisting the Union and engaging in concerted activities.

The credited evidence establishes that on about February 26, 1999, Michael Murphy, Gordon Byram, and Ralph Merriweather went to the IEC, identified themselves as union officials, also stated that they were journeyman electricians, and asked to submit employment applications. The IEC allowed them to file applications which, like applications filed by other job seekers, were valid for 30 days.

The credited evidence further establishes that about April 21, 1999, these three individuals returned to the IEC. They did not call the IEC in advance to obtain an appointment but just appeared there.

At that time, the IEC's executive director was occupied with matters relating to the IEC's apprenticeship program and did not wish to take time away from these duties to meet with people seeking employment as journeymen. In fact, the IEC office displayed a sign indicating that it was only taking applications for apprentices. The IEC had displayed a similar sign during the same general period the previous year. No credible evidence establishes that the IEC's decision to display this sign was motivated, either totally or partially, by antiunion animus.

When Murphy, Byram, and Merriweather appeared unexpectedly at the IEC office on about April 21, 1999, the IEC's executive director, Jennings, refused to take their applications. They did not make any further request to file applications.

The credited evidence does not establish that animus motivated or tainted Jennings' decision not to take applications from the three individuals when they came to the IEC on about April 21, 1999. To the contrary, Jennings articulated legitimate reasons, unrelated to union activity, for his decision not to take their applications at that time, and I credit his testimony.

As discussed above, I have concluded that the General Counsel has not established that the IEC is an employer within the Board's discretionary jurisdiction. However, were I to reach the merits of these allegations, I would conclude that credited evidence does not establish that the IEC violated the Act as alleged in complaint paragraphs 15 and 16.

IV. ALLEGATIONS PERTAINING TO RESPONDENT MILLS

A. "Discriminatory Hiring Practice" Allegations

Complaint paragraph 11 alleges that since about April 21, 1999, Mills has maintained a discriminatory hiring practice. Complaint paragraph 19 alleges that this practice violates Section 8(a)(1) and (3) of the Act. At hearing, the General Counsel made clear that these allegations refer to the hiring policy described below.

In hiring workers, Mills follows a written policy which appears somewhat elaborate but really boils down to this: Mills considers job candidates it knows before it considers candidates it doesn't know. The better Mills knows a job candidate, the earlier the candidate receives consideration.

The actual written policy has six categories. If Mills can fill a position with a candidate from category 1, then it does not consider candidates in categories 2 through 6. If it cannot fill the position with a candidate from category 1, but can fill it with a candidate from category 2, then it does not consider candidates in categories 3 through 6. In other words, job candidates in a particular category do not receive consideration until Mills has considered candidates in all categories with lower numbers and the position remains unfilled. The categories (which appear on GCExh. 58, "Hiring Priority Policy") are as follows:

> 1. Current employers [sic] of the company. (Out of town or state assignments).
> 2. Past employees with proven safety, attendance, and work records.
> 3. Applicants recommended by current Supervisors.
> 4. Applicants recommended by current employees.
> 5. Borrowed employees from area electrical contractors who have a surplus of personnel.
> 6. Unknown applicants as accepted under employment application policy.

There is absolutely no credible evidence that antiunion animus played any part in the adoption or retention of this policy. To the contrary, I find that Respondent was motivated solely by legitimate business considerations in adopting this policy.

B. The "Inherently Destructive" Theory

Notwithstanding the lack of evidence of unlawful intent, the General Counsel argues that the Government does not have to provide such extrinsic evidence of animus to establish a violation. Specifically, the General Counsel contended during oral argument that "the hiring scheme is 'inherently destructive' of employee rights, such that a finding of antiunion animus motivating the hiring scheme is unnecessary." The General Counsel bases this argument on the doctrine developed by the Supreme Court in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221 (1963); and other cases.

In *Great Dane Trailers*, supra, an employer announced that it would pay the vacation benefits due under the last collective-bargaining agreement only to those employees who had reported to work by a specified date. At that time, the employees were on strike, so the employer's policy denied the accrued vacation benefits to employees who exercised their statutory right to remain on strike. The Supreme Court affirmed the Board's finding of a violation. It stated:

> The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity. [*NLRB v. Great Dane Trailers*, 388 U.S. at 32.]

In applying the *Great Dane Trailers* theory to the facts of a particular case, it is important to keep in mind that the Supreme Court does not place the label "inherently destructive" on just any conduct which might have a negative impact on employee

rights. The Court reserves this description for an act so congruent with an unlawful purpose that the act itself reveals the animus behind it.

For example, when an employer imposed greater discipline on union leaders than on rank-and-file employees for engaging in an unprotected work stoppage, this targeting of union officials itself disclosed the unlawful motivation. The Supreme Court therefore found the action inherently destructive of employee rights. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983).

Similarly, the Court held that when an employer punished strikers by changing their relative seniority—thus, making them more vulnerable to layoff than nonstrikers—this action was inherently destructive of employee rights. *Labor Board v. Erie Resistor Corp.*, supra. Again, the targeting of this action—singling out employees who engaged in protected activity for adverse treatment—betrayed the unlawful motivation and no separate evidence of animus was necessary to find a violation.

On the other hand, the Supreme Court declined to find that an employer engaged in "inherently destructive" conduct during a labor dispute when the company hired temporary replacements after locking out the regular employees. Although this action negatively affected employees represented by the union, the act itself did not disclose an indisputable antiunion motivation. The Court found that legitimate business reasons could have motivated the action. Since the employer's true motivation could not be determined simply from the conduct itself, other evidence of animus was necessary to establish a violation. *Labor Board v. Brown,* 380 U.S. 278 (1965).

The Court carefully distinguished the conduct it found "inherently destructive" in *Labor Board v. Erie Resistor Corp.*, supra, from the conduct it did not find "inherently destructive" in *Labor Board v. Brown,* supra. In the former case, *Erie Resistor*'s act of granting the nonstrikers greater seniority than the strikers reasonably could be interpreted in just one way, and that one way led to the conclusion that the company was targeting employees who engaged in protected activity because of that protected activity. "The only reasonable inference that could be drawn," the Court observed, "was that [the conduct] was directed against the striking employees because of their union membership." *Labor Board v. Brown,* 380 U.S. at 287.

In the present case, nondiscriminatory reasons exist which reasonably could have motivated Mills to promulgate its hiring policy. Where lawful motives as well as unlawful motives may be inferred from the conduct itself, the issue of motivation cannot be resolved without looking at other parts of the record to find evidence of animus. As noted above, the present record contains no such extrinsic evidence of animus.

The Mills policy does not single out for adverse treatment any group of employees who had engaged in protected activity, and therefore affords no basis for drawing an inference of unlawful intent. Indeed, the only clear inference that may be drawn from the Mills hiring policy—which gives preference to candidates the employer knows over candidates the employer doesn't know—is that it follows a universal trend in human nature: People prefer the familiar to the unfamiliar.

For example, parents feel more comfortable if their son or daughter marries someone they know and trust rather than a stranger, even though the stranger may prove to be every bit as trustworthy. Because this preference for the familiar is a universal human trait, it reveals nothing specific concerning how particular parents feel about other matters, such as the suitor's race, religion, or union sympathies.

Similarly, the Mills hiring policy reveals nothing specific about how the employer feels about matters such as union sympathies. Therefore, I cannot conclude that this policy meets the Supreme Court's definition of conduct which is "inherently destructive" of employee rights.

Additionally, the record contains credible evidence of nondiscriminatory reasons for the policy. In the light of common sense, these reasons appear very plausible. An employer obviously would wish to hire an employee known to be a good worker rather than gamble on someone whose work habits were unknown. I credit this explanation.

If the Mills hiring policy has any effect at all on employee rights, that effect is comparatively slight. Therefore, to prove a violation the Government must produce evidence of antiunion motivation separate from the policy itself. As already noted, the present record contains no credible evidence of such animus. I conclude that the General Counsel has not established a violation.

Board precedent supports this conclusion. In *Kanawha Stone Co.,* 334 NLRB 235 (2001), the employer had a hiring policy which allowed a job applicant to be considered only if the applicant fell into one of the following categories: (1) employees on temporary lay off; (2) former employees; or (3) referrals from existing employees. Thus, the *Kanawha Stone* policy excluded outside applicants even more than the Mills policy at issue here.

Moreover, unlike the record in the present case, the record in *Kanawha Stone* did contain independent evidence of animus. Nonetheless, the Board found that this employer's hiring criteria constituted a legitimate reason for failing to consider a job applicant. The Board rejected the General Counsel's argument that such a hiring policy was inherently destructive of employees. The Board stated:

> [T]he judge found, and we agree, that the record does not support such a conclusion. The record establishes that, applying its hiring policy and criteria, the Respondent hired 36 people between March and August 1998. Seven of those employees were affiliated with a union. Even though few of those employees showed any interest in union organizing activity, this alone is not sufficient to support a finding of an inherently destructive hiring policy.

Kanawha Stone Co., supra, citing *Belfance Electric,* 319 NLRB 945, 946 (1995). Moreover, the Board implicitly accepted the legitimacy of the hiring criteria as a justification for failing to consider certain job applicants:

> [E]ven assuming that the General Counsel . . . met his threshold burden under FES [331 NLRB No. 20 [9]], we find that his case-in-chief was rebutted by the Respondent's showing that it lawfully would not have considered the applicants, even absent their union activity, because none of the appli-

> cants met any of the Respondent's three hiring criteria. [*Kanawha Stone Co.*, supra.]

If the *Kanawha Stone* hiring criteria were legitimate—and therefore not inherently destructive of employee rights—in a case containing independent evidence of employer animus, then most certainly in the present case, containing no such evidence of animus, the Mills hiring policy passes muster. I conclude that the "inherently destructive conduct" theory articulated in *Great Dane Trailers* and related cases, provides no justification for the allegations in complaint paragraph 11.

C. A Possible Hybrid Theory

Although the classic *Great Dane Trailers* theory would not justify finding a violation, it is possible that the Board has begun formulating a hybrid theory drawing strength both from the *Great Dane Trailers* principle and from the separate "disparate impact" theory familiar in cases under Title VII of the Civil Rights Act of 1964. A recent Board decision suggests—but does not state definitively—that the Board is developing new law in this direction.

Specifically, the Board's decision in *Aztech Electric Co.*, 335 NLRB 260 (2001), appears to depart from the Board's reasoning in *Kanawha Stone* and another recent hiring-policy decision, *Merit Contracting, Inc.*, 333 NLRB 562 (2001). The Board's *Aztech* decision is the most recent of these three opinions, but does not expressly overrule the others.

In the present case, therefore, this question arises: Should the Mills hiring policy be judged by the Board's holding in *Aztech* or does the Board's reasoning in *Kanawha Stone* control? These two precedents represent a fork in the road, and only one of the two paths may be chosen.

In *Aztech*, supra, the Board examined an employer's hiring policy which excluded from consideration any job applicant whose previous wage rate deviated from that employer's wage rate by 30 percent or more. Just as in the present case involving the Mills hiring policy, *Aztech* had adopted its policy for reasons unrelated to activities protected by Section 7 and the record contained no evidence of antiunion motivation. Nonetheless, the Board found the policy violative under an "inherently destructive" theory. The Board stated that *Aztech* was a case of first impression:

> Prior Board cases involving allegations that wage comparability hiring rules are unlawful have focused on whether there was specific evidence of an intent to discriminate in the promulgation or application of a rule. Here, however, we address for the first time an allegation that a rule is unlawful, even in the absence of evidence of antiunion motivation, because it is inherently destructive of Section 7 rights. [Footnote omitted.]

In *Aztech*, the Board concluded that the respondent's hiring policy—disqualifying applicants who had earned significantly higher wages in their previous jobs—constituted a "blanket denial of job opportunities for those who have had union representation on recent jobs, and in many cases have themselves become union members." The Board stated:

> It is undisputed that the implementation of the 30-percent rule had the effect of excluding from eligibility for hire virtually all West Coast electrician applicants who had worked for any significant period of the preceding year on a construction project where their wages were determined by a union-negotiated contract. . . .

Aztech Electric Co., 335 NLRB at 261. Therefore, the Board found the *Aztech* hiring policy violative, even without extrinsic evidence of animus, because the Board found the rule inherently destructive of employee rights.

Less than 5 months before it issued the *Aztech* opinion, the Board treated a similar issue differently in *Merit Contracting, Inc.*, supra. In that case, the Board examined an employer's policy which excluded a job candidate from further consideration if the job seeker's application listed prior wages exceeding the amount which this employer wished to pay. On its face, such a rule would appear more likely to disqualify union members than *Aztech*'s rule, which only excluded applicants with prior wages 30 percent or more higher that the rates the employer paid.

It would be reasonable to assume that if the employer's policy in *Aztech* inherently destroyed employee rights, then the hiring policy in *Merit Contracting* would be inherently destructive as well. However, in *Merit Contracting* the Board stated as follows:

> In his decision, the judge found that the Respondent scrutinized the applications it received for indications of "union wages" in prior employment and excluded an entire applicant class based on this practice. He concluded that this exclusionary conduct was "inherently destructive of important employee rights" and that union animus was implicit therein. . . .
>
> It is apparent that the judge's reference to "union wages" represented any wages listed in an application, whether requested or previously paid, which were higher than the Respondent wished to pay. However, *the Board has held that such a policy can be a legitimate justification for a refusal to hire,* in the absence of evidence that it has been implemented in the face of a union organizing campaign or applied disparately to avoid hiring union applicants. See *Wireways, Inc.*, 309 NLRB 245, 246 (1992).

Merit Contracting, Inc., 333 NLRB at 563 (emphasis added and footnotes omitted). The Board directed the judge to consider this matter further on remand.

In its subsequent *Aztech* decision, the Board did not overrule *Merit Contracting* or even mention that case. Therefore, it is difficult to reconcile these two opinions.

Possibly, the different result in *Aztech* might be explained if *Aztech* represents the starting point for the evolution of a new legal theory which does not rely solely on the classic "inherently destructive" theory of *Great Dane Trailers*, supra. Indeed, in *Aztech*, the Board does refer to a separate line of Supreme Court cases which arguably may constitute another distinct foundation for the Board's conclusions. These precedents concern Title VII of the Civil Rights Act of 1964 rather than the National Labor Relations Act.

In these Title VII cases, the Court found employer policies to be unlawful not because they were "inherently destructive" of employee rights, as in *Great Dane Trailers*, but because they had a "disparate impact" on a protected group. In *Aztech*, the

Board mentioned and perhaps invoked this "disparate impact" theory as well as the traditional "inherently destructive" theory to support its finding of a violation. Specifically, the Board stated in *Aztech* that:

> The Board's inherently destructive theory is analogous to the disparate impact theory long applied in cases prosecuted under Title VII of the Civil Rights Act of 1964. Under that theory, facially neutral employment policies that are "fair in form," i.e., they apply equally to blacks and whites or to women and men, nonetheless may be deemed unlawful if they are "discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (disparate impact on women of uniformly applied height and weight restrictions established a prima facie case of discrimination). [*Aztech Electric Co.*, 335 NLRB at 263.]

Another portion of the *Aztech* decision bolsters the conclusion that the Board was relying, in part, on a "disparate impact" theory to justify finding the hiring policy violative. Under the traditional *Great Dane Trailers* "inherently destructive" theory, the rule or policy reveals its unlawful motivation because it is targeted exclusively at employees engaged in some sort of protected activity such as going on strike or holding union office. A passage in *Aztech* suggests that the Board does not consider such targeting to be necessary:

> [E]ven conduct that does not divide the workforce based on participation in protected activities may be unlawful if it is inherently destructive of employee rights under the Act. See *Lone Star Industries*, 279 NLRB 550, 552–553 (1986) (a facially neutral policy may be unlawful under Great Dane where, in practice, it has "the predictable and actual effect" of penalizing union supporters), enfd. mem. in pertinent part sub nom. *Teamsters Locals 822 and 592 v. NLRB*, 813 F.2d 472 (D.C. Cir. 1987); see also *Greyhound Lines*, 319 NLRB 554, 572 fn. 15 (1995). [*Aztech Electric Co.*, 335 NLRB 262–263.]

Thus, Board law appears to be moving towards the view that the adverse effect of a policy is an important consideration in itself, regardless of how easy it is to infer unlawful intention from that effect. To the extent that the Board is moving in such a direction, it represents a shift towards a "disparate impact" analysis.

If the Board is, in fact, adopting the "disparate impact" principle as a basis for deciding the lawfulness of an employer's hiring policy, then this theory needs to be considered and applied in the present case. It is appropriate to begin with a comparison of the "disparate impact" and "inherently destructive" theories.

D. "Disparate Impact" and "Inherently Destructive" Theories Compared

The Supreme Court has stated that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory." *Teamsters v. U.S.*, 431 U.S. 324, 335 at fn. 15 (1977) (citations omitted).

On the surface, eliminating the need to prove motivation may appear to be a similarity between the "disparate impact" and "inherently destructive" theories. In fact, the absence of the element of unlawful motivation distinguishes the "disparate impact" theory from the "inherently destructive" rationale.

As already discussed, the *Great Dane Trailers* "inherently destructive" rationale does not eliminate the need to prove motivation, but only permits such proof to take the form of an inference from the conduct itself. By comparison, the Supreme Court did not say that proof of unlawful motivation could be inferred under a "disparate impact" theory. Rather it held that proof of discriminatory motive "is not required." *Teamsters v. U.S.*, 431 U.S. at 335 fn. 15.

In cases applying the "inherently destructive" theory to employer policies, the Supreme Court has taken pains to stress that this theory does not eliminate the need to prove animus but only allows the government to establish it by inference. As the Supreme Court emphasized in *Labor Board v. Brown*, supra, to constitute a violation of Section 8(a)(3), "both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary." *Labor Board v. Brown*, 380 U.S. at 286 (citations omitted).

The Court further emphasized the necessity of proving motivation by stating that if any doubt still persisted, "we laid it to rest in *Radio Officers' Union v. Labor Board* [347 U.S. 17 (1954)], where we reviewed the legislative history of the provision and concluded that Congress clearly intended the employer's purpose in discriminating to be controlling." *Labor Board v. Brown*, 380 U.S. at 287 (citations omitted).

In Board cases, a shift in emphasis from an "inherently destructive" theory to a "disparate impact" theory conceivably could change the amount of emphasis placed on the necessity of proving animus or the kind of evidence sufficient to warrant drawing an inference of animus. It is therefore appropriate to examine the facts of the present case as they would appear under a "disparate impact" theory. Before doing so, however, an unsettled question should be noted: At this point, it is not clear that the Act authorizes the use of a "disparate impact" theory.

In other contexts, the Supreme Court has been somewhat cautious about cross-pollinating other labor laws with Title VII's "disparate impact" principle. For example, in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), it expressly declined to consider whether the Age Discrimination in Employment Act of 1997 allowed proof of a violation through "disparate impact" analysis. Recently, the Supreme Court granted a petition for certiorari in a case presenting this question, *Adams v. Florida Power Corp.*, 255 F.2d 1322 (11th Cir. 2001), to resolve a split among the circuits. See Daily Labor Report, December 4, 2001, at AA-1.

At present, no Supreme Court decision has addressed whether the Act authorizes a "disparate impact" theory. The

analysis below will assume that it is appropriate to apply such principles in this case.

E. The Present Case Analyzed Under a "Disparate Impact" Theory

In examining the facts of this case under a "disparate impact" theory, a threshold question needs to be addressed: What evidence must the General Counsel present initially to bring the case within such a "disparate impact" framework and make analysis under a "disparate impact" theory appropriate? The Supreme Court discussed this standard in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a case cited by the Board in its *Aztech* decision.

In *Dothard v. Rawlinson*, supra, the plaintiffs presented evidence showing that an employer's height requirement would operate to exclude 33.29 percent of the women in the United States between the ages of 18–79, while excluding only 1.28 percent of men between the same ages. Considering this and similar evidence sufficient to meet the plaintiffs' initial burden, the Supreme Court stated:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face *conspicuously demonstrates a job requirement's grossly discriminatory impact.* [*Dothard v. Rawlinson*, 433 U.S. at 331 (emphasis added).]

Considering that the Board cited this Supreme Court decision in *Aztech*, it is appropriate to assume that if the Board is, in fact, adopting a "disparate impact" theory, *Dothard v. Rawlinson* accurately describes the burden which the Board would impose on the General Counsel.

The General Counsel is the plaintiff in Board proceedings so, in prosecuting a case under the "disparate impact" theory, the General Counsel would bear a burden analogous to that of a plaintiff in a "disparate impact" Title VII case. Therefore, the General Counsel must initially present evidence which, in the Supreme Court's words, "conspicuously demonstrates a job requirement's grossly disparate impact." Unless and until the General Counsel presents such evidence, the burden of proceeding does not shift to the Respondent.

In the present case, the General Counsel argued that the Mills hiring policy has a greater negative impact on persons who exercised their Section 7 rights than on persons who did not. However, arguing the point is not enough. The General Counsel must present evidence which "conspicuously demonstrates" the policy's grossly disparate impact. The record lacks such evidence so I must conclude that the government has not carried its burden of proof.

Stated another way, under a "disparate impact" theory, the General Counsel would bear the burden of presenting evidence to make conspicuous a cause-and-effect relationship between the policy in question and a grossly disparate impact on job candidates associated with the Union. Merely arguing that such a cause-and-effect relationship exists would not be sufficient. Even the most impeccable argument is no substitute for the necessary evidence.

In the present case, the General Counsel's argument is not impeccable. There are at least two problems with the government's reasoning. First, the General Counsel's argument rests on the questionable assumption that job candidates in the groups adversely affected by the hiring policy are more likely to be union adherents than job candidates in other groups. Second, the General Counsel's argument rests on the assumption that a policy which can be applied unlawfully will be applied unlawfully. Such an assumption improperly shifts the burden of proof to the Respondent to show that it will act in a lawful manner.

The first problem concerns the Government's argument that giving earlier consideration to a former employee than to a job candidate who is a stranger has a disparate impact on candidates who belong to the Union or favor unionization. This premise is based on still another premise, namely, that because Mills' employees are not represented by a union, Mills' current and former employees are less likely to desire membership in a labor organization.

This argument assumes that a person's sentiments for or against unionization are as difficult to change as sex or skin color, characteristics that place an individual in a class protected by the "disparate impact" theory under Title VII. However, the Act does not assume that a person's opinion about unions is immutable in the same way that sex and skin color are unchanging. To the contrary, the Act recognizes an employee's right to change his or her views at any time. Section 7 equally protects both the right to engage in union activity and the right to refrain from union activity but it does not force any employee to choose one of these options and stick with it forever.

The Board's own practices recognize that employees do not hold immutable opinions concerning unionization but instead make conscious decisions based upon the information available to them. Thus, before employees vote for or against a union in a secret ballot election, the Board orders the employer to provide the union with the names and addresses of the employees who will vote, "to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote." See, e.g., *Brinks Inc.*, 331 NLRB 46 (2000), citing *Excelsior Underwear*, 156 NLRB 1236 (1966), and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Employees would have no need for such information if their views on unions were predetermined and linked irrevocably to the unionized or nonunionized status of their employer. To assume such a link between the status of the employer and the union sympathies of the employee ignores more than 60 years of Board experience conducting elections in which, many times, employees chose a union notwithstanding their employer's adamant opposition.

Moreover, subpart C of the Board's Rules provides a procedure for employees to vote to decertify an incumbent union. Such a procedure implicitly recognizes that employees' views about a union can change. Even if their employer is unionized, the employees still have the freedom to choose not to be represented.

In sum, there is no logical basis to assume that an employee will be opposed to unions merely because the employee has worked or is working for a nonunionized employer. If that assumption were correct, then a union could never win an elec-

tion in an unorganized shop, which is patently contrary to the Board's long experience conducting elections.

To show that the Mills hiring policy has a disparate impact on prounion employees, the General Counsel must do more than rely on the dubious assumption just discussed. Instead, the government must present evidence demonstrating, for example, that job candidates in the groups considered first—employees and former employees—have a lower concentration of pro-union workers than job candidates in the groups considered later. The General Counsel has not presented such evidence.

Under the Mills hiring policy, job candidates recommended by a supervisor receive consideration earlier than candidates in three other categories, including candidates who apply in answer to help-wanted advertising or who come in off the street. The General Counsel contends that one of Mills' supervisors would be unlikely to recommend a candidate known to be pro-union.

The General Counsel's argument requires the assumption of a fact not in evidence, namely, that a supervisor will take the facially neutral policy and apply it in a discriminatory way. However, the General Counsel is not entitled to the benefit of such an assumption. The Board does not assume that a person will break the law merely because he has an opportunity to do so.

To the contrary, every unfair labor practice hearing begins with the presumption that the respondent has obeyed the law, and the General Counsel bears the burden of proving violative conduct by a preponderance of the evidence. All supervisors who hire employees have, by definition, authority to exercise independent judgment. See 29 U.S.C. §152(11). Anyone having such discretion necessarily has the opportunity to discriminate unlawfully, but such discrimination must be proven by evidence after the fact, and not merely assumed in advance to be inevitable.

In this case, the General Counsel has not alleged that Mills in a repeated violator of the labor laws with a propensity to commit unfair labor practices, and the evidence certainly would not establish such an allegation. Absent evidence to the contrary, I will presume that Mills and its supervisors exercise their hiring authority in a lawful manner.

This discussion has addressed logical problems with the General Counsel's argument, but it should be emphasized that argument alone will not satisfy the Government's burden of proof. Rather, under a "disparate impact" theory, the Government must present evidence which "conspicuously demonstrates a job requirement's grossly disparate impact." *Dothard v. Rawlinson*, 433 U.S. at 331. The Government has not presented such evidence.

In sum, were I to apply a "disparate impact" theory, I would conclude that the government has not presented credible evidence sufficient to shift the burden of proceeding to Mills to demonstrate legitimate business reasons for the hiring policy. Even if the General Counsel had presented such evidence, I would find that the policy was lawful because of Mills' legitimate and substantial business reasons for promulgating it.

F. The "Employee Sharing" Argument

In oral argument, the General Counsel asserted that Mills had violated the Act in another way, by "borrowing" employees during Mills' busy periods from contractors who did not need those employees at the time. The General Counsel called this practice "sharing employees" and argued as follows:

> In addition to its hiring preference policy, Mills used sharing of employees to avoid the possibility of hiring union applicants. Mr. Roudebush testified that Mills borrowed from various contractors, but did not claim or offer evidence that a single one of the loaning contractors was a union contractor. This system of borrowing employees was 100 percent effective in avoiding the hiring of union members.

It is not clear that the complaint covers this allegation. Complaint paragraph 11 alleges only that since about April 21, 1999, "Respondent Mills has maintained a discriminatory hiring practice." It certainly may be disputed that this language covers the practice of "borrowing" employees from other contractors.

Additionally, it is not clear that this issue was fully litigated at the hearing. However, I need not consider these procedural issues because the General Counsel's argument is meritless on its face.

For one thing, the argument improperly places the burden on the respondent to prove that it is innocent. The General Counsel bears the burden of proving that a respondent is guilty, and also bears the initial burden of proceeding. Until the General Counsel presents probative evidence passing a certain threshold, the Respondent need not present any evidence to justify its conduct.

Therefore, the General Counsel's statement that Respondent's vice president "did not claim or offer evidence that a single one of the loaning contractors was a union contractor" fails to recognize that the Respondent had no duty to show that it borrowed employees from a unionized contractor.

More fundamentally, the Respondent had no duty at all to borrow employees from a unionized contractor. The Act does not impose on an employer any affirmative duty to seek out employees who are members of or associated with a union. To the extent that the Act imposes a duty on an employer with an unrepresented work force, it is a duty of neutrality, a duty to treat all employees and job applicants similarly regardless of whether they support or oppose a union. Indeed, Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "contribute financial or other support" to a labor organization.

The evidence here fails to show that Mills harbored anti-union animus or was motivated by animus in any way. Accordingly, the General Counsel has not demonstrated that Mills committed any unfair labor practice when it borrowed employees from other contractors.

G. Additional Legal Analysis

For reasons discussed above, I have concluded that the Mills hiring policy did not violate the Act under either an "inherently destructive" or a "disparate impact" theory. Further, the record does not establish that Mills committed an unfair labor practice under any other theory.

The Board's decision in *Zurn/N.E.P.C.O.,* 329 NLRB 484 (1999), in instructive. That case involved an employer's hiring policy which closely resembled the Mills hiring policy here.

In *Zurn/N.E.P.C.O.,* supra, the General Counsel did not allege that the hiring policy was unlawful under an "inherently destructive" theory, and the Board did not consider such a theory. Rather, the General Counsel relied upon other evidence of animus to establish the element of intent. However, the Board rejected the General Counsel's argument, stating, "[W]e agree that the evidence presented is insufficient to support the General Counsel's theory that the policy as applied at the Florida jobsites unlawfully discriminated on the basis of union activities." *Zurn/N.E.P.C.O.*, supra.

The present record lacks any evidence of animus, making the case against the Mills hiring policy even weaker than the case against the hiring policy in *Zurn/N.E.P.C.O.* I conclude that the General Counsel has not proven that the Mills hiring policy violated the Act under any theory.

H. "Refusal-to-Consider" Allegations

Complaint paragraph 17 alleges that since about April 21, 1999, "Respondent Mills, through Jerry Roudebush, refused to consider for employment and/or hire Gordon Byram, Ralph Merriweather and Michael Murphy." Complaint paragraph 18 alleges that Mills engaged in this conduct to discourage employees from forming, joining or assisting the Union and engaging in concerted activities.

Uncontradicted evidence establishes that Byram, Merriweather, and Murphy never applied for work at Mills. The General Counsel seeks to overcome this fact - that the three alleged discriminatees never contacted Mills about employment or submitted job applications there–by asserting that the IEC was then acting as Mills' agent for hiring purposes. Complaint paragraph 8 specifically alleges that the IEC was "an agent of Respondent Mills for the purpose of acceptance and referral of employment applications to Respondent Mills." Moreover, in oral argument, the General Counsel contended that Mills was "liable for allowing the IEC as its hiring agent to act as such agent in a discriminatory pattern, by denying the right to union members to complete applications."

The credited evidence fails to establish that Mills ever authorized the IEC to act as its agent for hiring purposes. The General Counsel further argues that the record need not establish an actual agency relationship because liability may be imputed to Mills based on an apparent agency relationship. In oral argument, the General Counsel correctly summarized the doctrine of apparent authority as follows:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.

The Board has adopted this standard. See, e.g., *Dick Gore Real Estate,* 312 NLRB 999 at fn. 1 (1993).

The evidence in this case, however, discloses no instance in which Mills made any statement or other manifestation to create the appearance that the IEC was acting as its agent. Indeed, the General Counsel's oral argument did not cite any evidence indicating that a principal made such a manifestation. Instead, the General Counsel's oral argument referred to statements attributed to the IEC's executive director:

> In this case, the IEC Executive Director Jennings presented the IEC, as the exclusive referral agent of each of the contractor members. Clearly, it appeared from Jennings' statement that the IEC was acting for and on behalf of each of its members as the exclusive referral agent.
>
> Therefore, the discriminatory referral system maintained by the IEC is imputed to each contractor member regardless of its actual exclusivity.

The credited evidence does not establish that Jennings made any statements presenting the IEC as an exclusive referral agent, but even if he had, those statements would not create an apparent agency relationship. Neither Jennings nor the IEC was a principal in the alleged agency relationship. To the contrary, the government contends that the IEC and its executive director were the agents of the member employers.

Under the doctrine of apparent agency, only the statements of a principal can create the appearance that someone is acting with the principal's authority; the statements of a putative agent do not suffice. Were the law otherwise, anyone claiming to represent the city of New York could sell the Brooklyn Bridge and the city, bound by the act of this apparent agent, would be obliged to convey title. Obviously, that is not the law.

The General Counsel also invokes the doctrines of ratification and failure to repudiate. In oral argument, the General Counsel suggested that Respondent Mills, a member of the IEC, had failed to repudiate statements attributed to Jennings which created the appearance that the IEC was Mills' exclusive agent.

There are two problems with this argument. First, the credited evidence establishes that Jennings did not make the purported statements on which the General Counsel's theory relies. Second, the record fails to establish that Mills received any indication that Jennings had made such statements. A duty to repudiate cannot arise until and unless the putative principal has notice that someone has made a statement requiring repudiation.

The General Counsel seeks to overcome the second problem by contending that Mills did not need to have actual notice of a statement before being obliged to disavow it. In oral argument, the General Counsel stated:

> A failure to repudiate can be based upon a constructive, as well as actual knowledge of the agent's conduct which leads third parties to believe that the agency has been authorized.
>
> Certainly, there is here a failure by Mills to repudiate Jennings' statements suggesting that...all member contractors had . . . authorized the IEC to refer applicants to them.
>
> Mills hired a number of applicants immediately after referral by the IEC, and it's disingenuous to suggest that each such referral was unauthorized. These referrals were sought . . . testimony [of Mills' managers] reflect that

there were times when they asked specifically that these referrals be made.

Mills asking the IEC to act as its referral agent, acted on these faxed applications by hiring the applicants, and never repudiated IEC's conduct and their representations to applicants.

This argument must be rejected. Even assuming for the sake of analysis that Jennings stated to someone that the IEC was its members' exclusive source of employees, Mills would not have constructive notice of this statement merely by receiving the applications it had requested. Neither the fact that Mills asked the IEC to send it applications submitted by job seekers, nor the fact that Mills received such applications from the IEC, would give Mills any hint of what Jennings told the job seekers when they turned in the applications.

For example, even supposing that Jennings told job seekers that Mills paid electricians 200 dollars an hour, the fact that Mills had received applications from the IEC would give Mills no cause to believe—or even suspect—that Jennings had made the statement in question. Mills certainly would have no duty to repudiate until it had received significantly more specific notice that such a statement had been made.

Similarly, the record discloses no reason why Mills should believe or even suspect that the IEC would hold itself out as Mills' exclusive referral agent. When it needed employees, Mills sometimes placed help-wanted ads and did not rely on the IEC as the sole source for names of possible employees. The record doesn't establish that Mills ever told Jennings that Mills wanted the IEC to act as an exclusive referral agent. Mills certainly would have no reason to believe that the IEC had held itself out to be Mills' exclusive agent when Mills had not asked the IEC to take this role.

The credited evidence does not establish that Jennings ever told a job seeker that his application would be sent to Mills or to any other particular employer. The job seeker reasonably could believe only that his application would be made available to whatever association member had a need to hire employees during the 30-day period the application remained viable. In these circumstances, the credited evidence does not support a conclusion that Mills ever made the IEC its agent for the purpose of hiring employees or screening and recommending applicants for hire.

Because the IEC was not Mills' agent, when the three alleged discriminatees sought to file employment applications with the IEC, that action cannot be deemed an attempt to file job applications with Mills. Moreover, the record clearly establishes that the three alleged discriminatees never asked any representative of Mills about employment.

An employer cannot be found guilty of refusing to consider or hire an individual who never asked the employer for work. Therefore, I conclude that the General Counsel has failed to prove the allegations set forth in complaint paragraphs 17 and 18.

CONCLUSIONS OF LAW

1. CenTex Independent Electrical Contractors Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, but does not meet the Board's discretionary standards for the assertion of jurisdiction.

2. Mills Electric, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. International Brotherhood of Electrical Workers Local Union No. 520, affiliated with International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. CenTex Independent Electrical Contractors Association did not violate the Act in any manner alleged in the complaint.

5. Mills Electric, Inc., did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed.

Dated Washington, D.C. December 19, 2001

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.